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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,
Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

No. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, ET. AL.,
Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF.

HENRY L. GODDARD,
WARREN E. LIBBY,
R. L. DISNEY,
FRED E. SUITS,
FRED PTAK,
CHAS. H. GARNETT,
Counsel for Petitioners.

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THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

No. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, BURFORD C. HIGGINS, ESTELLA JONES NEE HIGGINS, CASS W. HIGGINS, AN INSANE PERSON, BY JACK JONES, HIS NEXT FRIEND AND DULY APPOINTED, QUALIFIED AND ACTING LEGAL GUARDIAN, EVA H. McMILLAN, FAIRY ADKINS, GERTRUDE KOELSCH NEE HIGGINS, AND NELLIE SHANNON NEE HIGGINS,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

PETITION FOR WRITS OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners George Noble and William Noble above named, and the petitioners Robert W. Higgins, Jr., John

T. Higgins, Raleigh E. Higgins, Burford C. Higgins, Estella Jones *nee* Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch *nee* Higgins, and Nellie Shannon *nee* Higgins above named, respectfully petition this Honorable Court for writs of certiorari in the above entitled causes to the Supreme Court of the State of Oklahoma, and respectfully show to this Honorable Court as follows:

A.

Summary Statement of the Matter Involved.

For convenience these cases will be referred to as the *Noble* case and the *Higgins* case, respectively. They were brought by the petitioners, as plaintiffs, in the District Court of Oklahoma County, in the State of Oklahoma, against the respondent, as defendant. Judgment was rendered in that court in each case for defendant. The petitioners appealed to the Supreme Court of the State of Oklahoma and appear in that court as plaintiffs in error against the respondent as defendant in error. That court consolidated the cases and affirmed the judgment of the trial court in a decision handed down February 19, 1935, which became final upon denial of petition for rehearing on May 7, 1935 (R. 222).

The subject matter of the litigation is certain real estate situated in Oklahoma City, in the County and State of Oklahoma. That involved in the *Noble* case is the north 40 feet of lot 6 in block 36 of the original townsite, and that in the *Higgins* case is a strip 100 feet wide and approximately 1325 feet long through the southwest quarter of Section 33, Township 12 North, Range 3 West of the Indian Meridian, and both are abandoned right of way of the Choctaw Coal and Railway Company and its successors in title. The

petitioners, as plaintiffs, alleged a cause of action in the trial court for ejectment of the defendant from this real estate and the quieting of title thereto in them (R. 1 and 146).

The land involved was originally a part of the tribal lands of the Creek Indians. By a series of treaties beginning with the Treaty of Washington, on January 24, 1826, 7 Stat. 286, and including the Treaty of Washington, on March 24, 1932, 7 Stat. 366, the Treaty of Fort Gibson, on February 14, 1833, 7 Stat. 417, and the Treaty of Washington, on August 7, 1856, 11 Stat. 699, the Creek Indians were removed from their lands east of the Mississippi, which were ceded to the United States, to lands ceded to them by the United States in the Indian Territory, now the State of Oklahoma, and the fee title to which was conveyed to them by said treaties and the Acts of Congress approving them, and by a patent issued pursuant thereto by Millard Fillmore, President of the United States, on August 11, 1852, and recorded in Volume 4 of Indian Deeds in the Office of Indian Affairs, pages 446 and 447 (R. 136).

By similar treaties and conveyances the Choctaws and Chickasaws were given a fee title to their lands in the Indian Territory, now the State of Oklahoma.

By the Treaty of Washington, on June 14, 1866, 14 Stat. 785, the Creeks for a consideration of $975,168.00, ceded to the United States the western half of their entire domain in trust to be sold and used as homes for such other civilized Indians as the United States might choose to settle thereon. The line between the eastern half and the western half of their lands was defined and located. It is now the line between Lincoln County and Creek County in the State of Oklahoma.

By Act of March 30, 1885, 23 Stat. 362, Congress authorized the President to open negotiations with the Creeks and other Indians for the opening to settlement under the home-

stead laws of certain of their lands in the Indian Territory. Under this authority a treaty was negotiated with the Creeks at Washington, on January 19, 1889, 25 Stat. 757, by which they for a consideration of $2,280,857.10 ceded and granted to the United States full and complete title, without reservation or condition, to the entire western half of their lands, which they had previously ceded to the United States in trust, to be "entirely freed from any limitation in respect to the use and enjoyment thereof," and surrendered and extinguished all their claims of whatsoever nature thereto. By Article IV it was provided that:

> "These articles of cession and agreement shall be of no force or obligation upon either party until they shall be ratified and confirmed, first, by Act of the National Council of said Muscogee (or Creek) Nation, and secondly, by the Congress of the United States." (R. 59.)

This Treaty was ratified and confirmed by the National Council of the Creek Nation on January 31, 1889, and by Congress on March 1, 1889, 25 Stat. 757. The Act of Congress ratifying and confirming it further provided:

> "That the lands acquired by the United States under said agreement shall be a part of the public domain."

By the Indian Department Appropriation Act, approved March 2, 1889, 25 Stat. 1003, Congress made an appropriation for the purchase from the Seminole Nation of a part of their lands and authorized the President to negotiate such purchase, and further provided that upon the purchase thereof such land should become part of the public domain and should be disposed of to actual settlers under the homestead laws only, but that no person should be permitted to enter thereon until the same were opened for settlement by proclamation of the President, and further that the foregoing provisions should apply to and regulate

the disposal of the lands acquired from the Creek Indians by the Treaty of January 19, 1889, which became effective on approval by Congress on March 1, 1889.

On March 23, 1889, the President issued his proclamation opening a portion therein described of the lands acquired from the Creek Nation and the Seminole Nation to settlement under the homestead laws at the hour of 12:00 o'clock noon, on April 22, 1889.

The land where the city of Oklahoma City is now located was included in the western half of the lands of the Creek Nation acquired by the United States and opened for settlement under the President's proclamation.

On February 18, 1888, Congress passed an Act authorizing the Choctaw Coal & Railway Company to build a line of railroad from a point on Red River, at the bluff known as Rocky Cliff in the Indian Territory (south of what is now Ardmore, Oklahoma) and running thence by the most feasible and practicable route through said Indian Territory to a point on the boundary line between Indian Territory and Arkansas opposite Polk or Sevier Counties in that State, 25 Stat. 39. On February 13, 1889, Congress passed an Act amending the first section of the Act of February 18, 1888, by authorizing the Choctaw Coal and Railway Company to build a branch line of railway from some suitable point on the main line westerly and northwesterly to the company's coal veins in Tobucksey County in the Choctaw Nation (near what is now Hartshorne or Haileyville, Oklahoma (R. 124-125), thence by the most feasible and practicable route to an intersection with the Atchison, Topeka & Santa Fe Railway, hereinafter referred to as the Santa Fe, at a point between Halifax Station and Ear Creek (near what is now Goodwin, Oklahoma (R. 124-125). 25 Stat. 668.

The original Act invested and empowered the railway company with the right of locating a railway through the

Indian country between the terminal named, and with the right to construct, use and maintain its tracks upon the right of way therein provided for, and with the right to take and use, for purposes of a railway and for no other purpose, a right of way 100 feet wide through the Indian Territory, and further provided that whenever any part of the lands so authorized to be taken should cease to be used for railway purposes, the same should revert to the Nation or Tribe of Indians from which it was taken. It also provided for the payment of compensation for all property of individuals taken or damaged in the construction of the road, and for the payment of $50.00 a mile to the Indian Tribe whose land was taken for a right of way, with proviso that in event of the dissent of any Tribe to such allowance, the determination of a just compensation should be by appraisement of three disinterested referees from whose award either party might appeal by original petition either to the District Court at Fort Smith, Arkansas, or to the District Court for the Northern District of Texas, which courts should have jurisdiction to hear and determine the subject matter of such petition, according to the laws of the state in which heard for determining damages for property taken for railroad purposes. The Amendment was of the first section only and merely conferred authority to construct a branch to the main line between certain termini named. None of the provisions of the original Act for acquiring title to a right of way were changed by the Amendment. Both the original Act and the Amendment are set out in full in the printed record in these cases at pages 26 to 33.

Prior to April 22, 1889, a date commonly referred to as the "Opening," the above company, herein referred to as the Choctaw Railway Company, had surveyed and marked a line of its proposed railroad from the north and south tracks of the Santa Fe Railway through what is now Okla-

homa City, in a northwesterly direction across the southeast quarter of Section 33 in Township 12 North of Range 3 West of the Indian Meridian. It was a matter of common knowledge at the time that a townsite would be laid out on this quarter section.

Prior to the Opening a plat of such townsite had been made on paper and at 12:00 o'clock noon on April 22, 1889, a surveyor's gang stepped off the Santa Fe right of way and began to run lines and drive stakes to mark the lots and blocks of the townsite. Several thousand persons arrived on this townsite and staked and occupied lots that day. As the survey proceeded they adjusted their lot claims and boundaries to the surveyed lines. When the townsite surveyors reached the right of way which the Choctaw Railway Company had surveyed, they and the lot claimants wholly disregarded such claimed right of way, but surveyed and staked lots across it as though it were not there. All of the lots in the original townsite, comprising the southeast quarter of said Section 33, were occupied the day of the Opening (R. 118, 132, 134). On that day the ancestor of the petitioners in the *Noble* case staked and occupied lot 6 in block 36, in the townsite of Oklahoma City, the north 40 feet of which is involved in this litigation. On the same day Robert W. Higgins settled upon the southwest quarter of said Section 33, and undertook to file a homestead entry upon it. But his right to file was contested and was not finally permitted until after a decision in his favor by the Secretary of the Interior on June 29, 1894. *Higgins* v. *Adams,* Volume 18, page 598, of Decisions of the Department of the Interior Relating to Public Lands. The lots in the townsite were improved with dwellings and business buildings as promptly as these could be erected. The City had about 5,000 population from the Opening (R. 127). All the lots had substantial

value on that day and this increased with the passing of time and the erection of improvements.

On July 13, 1889, the Choctaw Railway Company filed with the Secretary of the Interior a map of definite location of its line of road extending from the Santa Fe tracks at Oklahoma City westerly to Fort Reno in Canadian County (Exhibit 12, R. 90A).

For more than a year after the opening there was no provision of law operative in Oklahoma Territory for the entry of public lands for a townsite. In a few days after the opening some of the citizens gathered together and discussed the matter of a government, and the general opinion was that some form of government should be established and upheld. So a regular election was called by a committee of citizens and was duly held and city officials, consisting of mayor, recorder, city attorney, etc., were elected. This was a purely voluntary municipal organization without any authority of law, but it was acquiesced in by the people. Ordinances were adopted. A plat of the townsite was filed in the office of the city recorder and provision was made for recording transfers of platted property. The city recorder issued certificates to the occupants of lots on the townsite and transfers of lot rights were made by quit claim deeds and lot certificates which were filed for record in the city recorder's office (R. 132-133).

On May 14, 1890, Congress passed the Oklahoma Townsite Act, 26 Stat. 109. Pursuant to its provisions boards of townsite trustees were appointed and entry of the southeast quarter of said Section 33 as a townsite was promptly made and patent was issued in due course conveying the same to Townsite Board No. 2 as trustees in trust for the lot occupants thereof. The patent purported to convey the entire quarter section, without exception, limitation or reservation, for a townsite (R. 6). As speedily as the

trustees could determine who was entitled to the various lots, they issued their trustees deed conveying them accordingly. They adopted the survey and plat of the City of Oklahoma City as made on April 22, 1889, as the townsite plat.

Meanwhile, beginning in 1889 and extending into 1891, a strenuous controversy was waged between the Choctaw Railway Company on the one hand and the lot claimants on the other, over the question of whether the Company had priority for its right of way through the city over the rights of the lot claimants. The Company contended that the Acts of Congress above mentioned were a grant to it *in praesenti* of title to such right of way, and the lot claimants denied this and contended that because of their occupation of the lots before the filing by the Company of its map of location, their rights thereto, being prior in time, were superior. The fact, and much of the details, of this controversy is shown by the testimony of all the witnesses, Cornelius (R. 95), Owen (R. 112), Ebey (R. 132), and Scott (R. 134), and also by the Committee Report of the House of Representatives on the bill to authorize the issuance of bonds by Oklahoma City to acquire a right of way for the Company (R. 125).

It was finally settled by an agreement by which the Company abandoned its claim to a right of way under the Act of Congress and agreed to change its line from that shown on its map of location and take a course through the City parallel to the streets and alleys as surveyed and laid out and take a right of way only 100 feet wide, instead of 300 feet wide which it had originally claimed for right of way and station grounds. On its part the City and its Citizens Committee agreed to obtain such new right of way and procure the conveyance of the title thereto from the lot owners without cost to the Company. (See testimony of witnesses and Committee Report above mentioned).

This agreement was carried out and a new right of way was located so as to include the 20 feet of alley between First and Second Streets and 40 feet off the south end of lots fronting north on Second Street, and 40 feet off the north end of lots fronting south on First Street (Exhibit 13, R. 90B). Deeds were obtained from the lot owners, of whom the ancestor of petitioners Noble was one, conveying the necessary land to the Company for railway and right of way purposes, with the following clause expressly providing for reversion of the land conveyed to the grantors in event it ceased to be used for railroad purposes, to wit:

> "Being intended for the use and occupation of said party [grantee], its successors and assigns, as and for its right of way for the constructing, operation and maintenance of its railroad and business at or upon the land hereby released and quit-claimed: Provided, that in case of abandonment of said premises by said second party, its successors or assigns, for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns." (R. 10.)

Some of the lot owners would not sell their land necessary for the right of way at a price the Citizens Committee would pay and so resort was had to condemnation proceedings in the name of the Railway Company against them early in 1891. But the ancestor of petitioners Noble was not one of these, and ultimately all of them, upon receiving the condemnation money, executed right of way deeds similar to the Noble deed.

The right of Robert W. Higgins to make homestead entry on the southwest quarter of said section 33 being involved in a land office contest until June 29, 1894, the patent to him therefor was not issued until September 19, 1896 (R. 151). The Company meanwhile had constructed its road across this quarter section and had had its trains in operation over it since 1892. But on March 24, 1898, it obtained from

Robert W. Higgins and wife, for a consideration of $400.00, a conveyance termed a right of way deed and release of damages, which conveyed a strip of land 100 feet wide across said southwest quarter, part of which is the land here involved in the *Higgins* case, "for a right of way for its railroad, telegraph, and telephone lines, and for railroad or station purposes," with the habendum clause thereof in the following language:

> "To have and to hold the same by the said Choctaw, Oklahoma and Gulf Railroad Company, together with all and singular the rights, privileges and appurtenances thereunto belonging and all the rights and privileges which said company is authorized to have, hold and exercise under and by virtue of the Act of Congress granting the Choctaw Coal and Railway Company a right of way through the Indian Territory, approved February 18, 1888, and subsequent Acts of Congress amending and extending said Act together with all the rights and privileges granted unto said Choctaw, Oklahoma and Gulf Railroad Company by an Act of Congress approved August 24, 1894, and the Act of Congress approved April 24, 1896, and unto its successors, and assigns forever." (R. 153.)

Beginning late in 1891 the Company constructed its line of road through Oklahoma City on the right of way obtained for it by the City and Citizens Committee of Oklahoma City in settlement of its controversy with the lot claimants and conveyed to it by right of way deeds such as the Noble deed. The road thus constructed was operated by the Choctaw Coal & Railway Company and its successor, the Choctaw, Oklahoma & Gulf Railroad Company down to December 4, 1930. On November 17, 1927, the two companies last named, together with the St. Louis-San Francisco Railway Company, entered into a contract (R. 123) with the City of Oklahoma City, respondent here, whereby for a consideration of $4,000,000.00 they agreed to sell and convey such

title as they had to their rights of way across the land here involved and other land and remove therefrom their tracks which cut through the heart of the business district of the City and had become a serious public inconvenience. Thereafter the said successors to the Choctaw Coal and Railway Company applied to the Interstate Commerce Commission for a certificate of necessity and convenience permitting them to abandon the portion of their right of way which they had contracted to sell, including that here involved, and obtained such certificate in due course (R. 11), and then executed their quit claim deed to the City for such abandoned portion of their right of way and were paid the agreed consideration therefor (R. 49 and 177).

On December 4, 1930, they abandoned this right of way, removed their rails, ties and all railway property therefrom, and delivered possession to the City (R. 50). On the next day, December 5, 1930, in an action brought by the City against the railroad companies in the United States District Court for the Western District of Oklahoma, it was determined and adjudged and a decree was entered (R. 37) that the land in question had been abandoned for railroad purposes, and that the railroad companies' title thereto had passed to the City under the Act of Congress of March 8, 1922, 42 Stat. 414 (R. 87).

It was conceded in the trial court in the instant cases, and also in the Supreme Court of Oklahoma, that upon abandonment of this right of way by the railroad company its title terminated and the land reverted either to the United States or to petitioners through their predecessors in title. In its decision the Supreme Court said on this point:

> "It is conceded that upon abandonment by the railroad company its title terminated. We must determine, however, whether or not the reverter inured to the United States or passed by the government patent issued to plaintiff's predecessors." (R. 210.)

The City took possession of the land here involved on December 4, 1930, and has remained in possession continuously since. These cases were filed in December, 1930, and January, 1931. The City admits that it is not using, and does not intend to use, this land for railroad purposes, but will devote it to the purpose of a public park (R. 16-17).

The respondent's claim is that under the Act of February 18, 1888, as amended by the Act of February 13, 1889, the Choctaw Coal and Railway Company became vested with title *in praesenti* to the right of way as thereafter located and obtained and upon which its road was constructed through the City of Oklahoma City, and that upon its abandonment of such right of way, the title thereto reverted to the United States under said Acts of Congress, and that by virtue of the Act of Congress of March 8, 1922, 42 Stat. 414, the reversionary right and title that passed to the United States was granted to the City, and that it, therefore, became owner of the land within the boundaries of such right of way upon its abandonment.

The petitioners claim that the Act of February 18, 1888, and the Amendment thereto of February 13, 1889, was not a grant *in praesenti* of a right of way, but was merely a grant of the right to acquire a right of way by purchase or condemnation through Indian country only, the title thereto not to vest until taken and paid for as in the Act prescribed, and that the Act itself had no application outside of the Indian country or in the public domain, and that the land here involved was Creek Indian land at the time of the enactment of the Amendment of February 13, 1889, and that the only title to its right of way that the Company acquired was that conveyed by the deeds of the petitioners' ancestors under both of which the title to the right of way on the abandonment of it for railroad purposes would revert to the grantors, their heirs or assigns.

The petitioners also claim that even if the Act of February 18, 1888, with the Amendment thereto, granted a right of way *in praesenti* to the Choctaw Railway Company, still by the express language of the Act there was a right of reverter in the Creek Tribe of Indians, which passed by treaty and cession to the United States, in event such right of way ceased to be used for railroad purposes, and that this right of reverter in the United States passed by its patent to the patentee and by deed and inheritance to the petitioners in each case, so that upon the extinguishment of the railroad title by abandonment for railroad use, the full title reverted to them. They also claim that the Railroad Company was estopped by virtue of the right of way deed with express reversion clause therein to deny or dispute the title of its grantors, or to deny that it abandoned its claim to a right of way under the Act of Congress and took title to its right of way under the deed from the land owners, or to assert a title derived from any other source. They also claim that the Act of March 8, 1922, does not apply to the facts of these cases, for that there never was any patent by virtue of which, in the language of that Act, title could pass to the City.

The trial court upheld the contention of the City, defendant below and respondent here, and denied the contentions of the plaintiffs below and petitioners here (R. 139 and 186). On appeal the Supreme Court of Oklahoma affirmed the judgments of the trial court (R. 195).

B.

Reasons Relied on for the Allowance of the Writs.

As grounds for allowance of the writs hereinafter prayed for the petitioners say:

I.

That the decision of the Supreme Court of Oklahoma below, being the highest court of said State in which a decision could be had in these cases, decides a Federal question of substance in its construction and application of the Act of Congress of February 18, 1888, 25 Stat. 39, and the Amendment thereto of February 13, 1889, 25 Stat. 668, to the facts of these cases in a way not in accord with the applicable decision of this Court in *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, and in conflict with the applicable decisions of inferior Federal courts in *Cherokee Nation* v. *Southern Kansas Railway Co.* (D. C. West. Dist. Ark.) 33 Fed. 900, and *United States* v. *Fort Smith & Western Railway Co.* (8th C. C. A.) 195 Fed. 211, for that the said Supreme Court of the State of Oklahoma held that said Acts of Congress granted a right of way vesting *in præsenti* to the Choctaw Coal & Railway Company through the Indian Country between the termini named in said Acts, notwithstanding the decision of this Court in the case cited, and of the inferior Federal courts in the cases cited, held that other Acts of Congress, in precisely the same language and under precisely the same fact situation as those, did not grant title to a railroad right of way *in præsenti*, but granted merely a franchise to construct a railway through the Indian Territory and authorized and empowered the railway company named therein to condemn, pay for and acquire a right of way therefor under the power of eminent domain.

II.

That in the alternative, if the decision of the Supreme Court of Oklahoma below should not be deemed to be not in accord with the applicable decision of this Court and those of inferior Federal courts as set forth in paragraph

I, *supra,* then said State court, in its construction and application of said Acts of Congress to the facts of these cases, has decided a Federal question of substance which has not heretofore been, but should be now, determined by this Court, for that the construction and interpretation of said Acts of Congress by said State court is contrary to the natural, reasonable and ordinary meaning of the language used therein, and to the intention and purpose of Congress as shown in the debate upon their enactment, and to the settled executive and administrative interpretation of them through a long period of years.

III.

That the decision of the Supreme Court of Oklahoma below, being the highest court in said State in which a decision in these cases could be had, decided a Federal question of substance in a way not in accord with the applicable decisions of this Court and of inferior Federal courts and of other State courts of last resort, for that said State court, after holding that the Choctaw Coal & Railway Company was granted by Congress a right of way vesting *in præsenti* through the land where Oklahoma City is now located prior to said land becoming part of the public domain on March 1, 1889, held further that the patents for such land issued thereafter by the United States, though purporting to convey the whole of the tracts therein described, did not pass any title to the patentee to the fee or right of reverter underlying the granted right of way and that upon abandonment of said right of way for railroad purposes the land would revert to the United States instead of to the patentee or those claiming under him; and that this holding is not in accord with the decisions of this Court in *St. Joseph & Denver C. R. Co.* v. *Baldwin,* 103 U. S. 426; *Smith* v. *Townsend,* 148 U. S. 490; *Rio Grande Western Ry. Co.* v. *Stringham,* 239 U. S. 44; nor with the

decision of the Eighth Circuit Court of Appeals in *Denver & R. G. R. Co.* v. *Mills,* 222 Fed. 481; nor with the decisions of the Supreme Court of Idaho in *Oregon Short Line* v. *Stalker,* 14 Ida. 362, 94 Pac. 56; *Crandall* v. *Goss,* 30 Ida. 661, 167 Pac. 1025; *Hurst* v. *Idaho-Iowa Lateral Canal Co.,* 34 Ida. 342, 202 Pac. 1068; *Bowman* v. *McGoldrick,* 38 Ida. 30, 219 Pac. 1063.

IV.

That the decision of the Supreme Court of Oklahoma below, being the highest court of said State in which a decision could be had in these cases, has decided a Federal Question of substance which has not heretofore been, but should be now, determined by this Court, for that said State court, after holding that the Choctaw Coal & Railway Company was granted by Congress a right of way vesting *in præsenti* through the land where Oklahoma City is now located prior to said land becoming part of the public domain on March 1, 1889, held further that said Railway Company could not lawfully abandon, and hence did not in law though it did in fact abandon, its claim to such granted right of way, and that its action in actually acquiring a right of way through said City by purchase from owners holding title by patents from the United States, whose deeds to it contained an express reversion clause whereby it contracted and agreed that the land therein conveyed when abandoned for railroad purposes should revert to the grantors, their heirs or assigns, was of no legal consequence because the acts of Congress prohibited its acquiring a right of way in such manner.

V.

That the decision of the Supreme Court of Oklahoma below, being the highest court of said State in which a deci-

sion could be had in these cases, has decided a Federal question of substance which has not heretofore been, but should be now, determined by this Court, in that it construed the Act of Congress of March 8, 1922, 42 Stat. 414, as applied to the facts of these cases as having the effect to defeat the title to the abandoned railroad right of way through Oklahoma City in those claiming under the original patentees from the United States and to transfer and vest such title in the municipality of the City of Oklahoma City.

VI.

That, as may properly be inferred from the fact that there are 166 lots in Oklahoma City all or part of which are in the abandoned railroad right of way referred to in these cases (Exhibit 13, R. 90B), a large number, possibly 100, similar cases are pending or will be brought, and these, if the decision of the Supreme Court of Oklahoma in the instant case becomes final, will be prosecuted in the United States courts, which will not be bound by the decision of the Supreme Court of Oklahoma but will decide the questions anew, and may reach a decision different from the State court, with the result that this Court will have the questions here raised again presented to it in a petition for a writ of certiorari, and therefore, for the practical and legal, if not statutory, reason of settling the matter and putting an end to litigation and avoiding conflict of decision in inferior courts, this Court ought to grant certiorari in these cases.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Oklahoma commanding that court to certify and send to this Court for its review and determination on a day certain

to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket as No. 23,821, George Noble and William Noble, Plaintiffs in Error, *v.* The City of Oklahoma City, a Municipal Corporation, Defendant in Error, and No. 23,822, entitled Robert W. Higgins, Jr., John T. Higgins, Raleigh E. Higgins, Burford C. Higgins, Estella Jones nee Higgins, Cass W. Higgins, an Insane Person, by Jack Jones, his Next Friend and Duly Appointed, Qualified and Acting Legal Guardian, Eva H. McMillan, Fairy Adkins, Gertrude Koelsch nee Higgins, and Nellie Shannon nee Higgins, Plaintiffs in Error, *v.* The City of Oklahoma City, a Municipal Corporation, Defendant in Error, and that the judgment of the said court in the said cases may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

HENRY L. GODDARD,
WARREN E. LIBBY,
R. L. DISNEY,
FRED E. SUITS,
FRED PTAK, and
CHAS. H. GARNETT,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

No. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS, RALEIGH E. HIGGINS, BURFORD C. HIGGINS, ESTELLA JONES NEE HIGGINS, CASS W. HIGGINS, AN INSANE PERSON, BY JACK JONES, HIS NEXT FRIEND AND DULY APPOINTED, QUALIFIED AND ACTING LEGAL GUARDIAN, EVA H. McMILLAN, FAIRY ADKINS, GERTRUDE KOELSCH NEE HIGGINS, AND NELLIE SHANNON NEE HIGGINS,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the Supreme Court of the State of Oklahoma in these cases is not yet officially reported, but is reported in 44 Pac. (2d) 135.

Jurisdiction.

I.

The date of the decision to be reviewed is February 19, 1935, which became final upon the denial of petition for rehearing on May 7, 1935.

II.

The specific claim advanced below and relied on here to give this Court jurisdiction is that both in the trial court and in the Supreme Court of Oklahoma, the defendant below and respondent here claimed title to the real estate involved in the litigation under the provisions of the Acts of Congress of February 18, 1888, 25 Stat. 39, and the Amendment thereto of February 13, 1889, 25 Stat. 668, and the Act of Congress of March 8, 1922, 42 Stat. 414.

III.

The jurisdiction of this Court is invoked under the provisions of Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936; Title 28, Section 344, U. S. Code.

IV.

Certiorari has been granted in cases similar to these at probably every term of this Court for the past several years. They recognize and sustain the jurisdiction of the Court. Specific cases are:

State of Minnesota v. *George Blasius*, 290 U. S. 1;

Missouri State Life Ins. Co. v. *Jester Jones*, 290 U. S. 199;

John L. Gilvary v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57.

Statement of the Case.

A sufficiently full statement of the case has been given under the summary statement in the petition for the writs to which this brief is attached, and for brevity no part thereof is repeated here.

Specification of Errors.

The petitioners say that the Supreme Court of Oklahoma erred in the following particulars in its decision in these cases:

I.

In holding that the Act of Congress of February 18, 1888, 25 Stat. 39, termed the Choctaw Railway Act, and the amendment thereto of February 13, 1889, 25 Stat. 668, granted and conveyed to the Choctaw Coal and Railway Company title to a right of way between the termini named therein vesting and effective *in præsenti* upon the enactment of the act, the error of which holding is established:

(a) By the language of the Act itself, for that its language does not purport to grant any title vesting *in præsenti* to a right of way, but does purport only to grant a franchise to the Railway Company to construct a railroad through the Indian Country between the termini named, and to acquire such right of way by purchase or condemnation and to exercise the power of eminent domain to condemn, pay for and take such right of way for the price and upon the terms and conditions stated in the Act.

(b) By the fact that the land across which the railroad was to be located under the provisions of the original Act as enacted in 1888 was owned in fee simple by the Choctaw and Chickasaw Indian Nations and remained their tribal property until its allotment in severalty by the Dawes Com-

mission some fifteen years thereafter, and the fact that by the Amendment of February 13, 1889, the only change made in the original Act was to authorize the construction of a branch line of road between certain termini named, the location of which would cause such branch to be constructed across land owned in fee simple by the Creek Nation of Indians, and that Congress was without constitutional authority to appropriate or grant the property of any of these Indian Nations for a public use without or in advance of compensation to them to be fixed with their consent, or to be ascertained by condemnation proceedings, if they did not agree on the compensation.

(c) By Congressional and Departmental construction of the Act, for that the debates in Congress at the time of the enactment of the original Act show that it was understood and intended not to be a grant of a railroad right of way, but only the grant of a franchise to construct a railroad through the Indian Country and to acquire a right of way therefor by purchase or condemnation and the payment of full compensation, and for that later Acts of Congress relating to the Choctaw Railway Company acquiring other rights of way, viz, Act of August 24, 1894, 28 Stat. 502; Act of April 24, 1896, 29 Stat. 98; and Act of March 28, 1900, 31 Stat. 52, distinctly show that no grant of a right of way vesting *in præsenti* was made or intended to be made in said Choctaw Railway Act, and for that the executive branch of the Government in the administration of the Act, both in the message of President Benjamin Harrison vetoing the Oklahoma City bond bill (R. 130) and in the Attorney General's opinion by Assistant Attorney General Willis Van Devanter rendered at the instance of the Land Office (27 L. O. Dec. 414), ruled that it was not a grant of title to a right of way vesting *in præsenti.*

(d) By decisions of the courts of the United States which are conclusive and controlling on the subject, for that the court overlooked or disregarded the decision of the District Court of the United States for the Western District of Arkansas in *Cherokee Nation* v. *Southern Kansas Railway*, 33 Fed. 900, and considered the decision of the Supreme Court of the United States in *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, only to the extent of making the erroneous statement that it was not in point, notwithstanding it is precisely in point and controlling upon all state courts, and for that the court overlooked or disregarded the decision of the Eighth Circuit Court of Appeals in *United States* v. *Ft. Smith & Western Railway Co.*, 195 Fed. 211.

II.

In holding as a matter of law that under the Act of February 18, 1888, and the Amendment of February 13, 1889, the Choctaw Coal and Railway Company was not permitted (it being assumed for the sake of argument only that the Choctaw Railway Act was a grant of title *in præsenti*) voluntarily to abandon its granted right to locate its right of way through the public domain after occupation thereof by citizens claiming a right thereto as settlers upon public lands and to proceed to acquire title to a right of way from such settlers by purchase or condemnation, with full recognition of the title, ownership or possessory right of said settlers in such lands, but that it was compelled to claim and take title through the public domain solely under the Act, even though it desired and chose to and did in fact abandon all claim to a right of way thereunder and did in fact acquire one by purchase and deed whereby it expressly contracted and agreed that the land conveyed should revert to its grantor if and when such land ceased to be used for right of way and railroad purposes.

III.

In holding that (it being assumed for the sake of argument only that the Choctaw Railway Act was a grant of title *in præsenti* and that the right of way which the Railway Company acquired over the land of petitioners' ancestors was acquired under such grant and not by purchase) the patent issued by the United States to petitioners' predecessors in title did not convey the full fee simple title to the land therein described and every right which the United States had therein, subject to the railroad right of way, but that the land included within the boundaries of said right of way was excluded from the public domain and reserved to the Railway Company and the United States and no title to the underlying fee or reversionary right therein did or could pass to the patentee by virtue of the patent, but remained in the United States, and in holding further that upon the abandonment of said right of way for railroad purposes in 1930 by the railroad successors to the Choctaw Coal and Railway Company, the title thereto reverted to the United States and not to the original patentee or his successor in title, for that the cases cited and relied on by the court to support its holding are without exception those in which there was a controversy between a patentee of a tract of land and a railroad company to which a right of way had been granted *in præsenti* by Act of Congress through the public domain over the right to the surface, or some part of the surface, while the railroad use of it for right of way continued, and for that the court overlooked or disregarded the controlling decisions of the Supreme Court of the United States in *Rio Grande Western Ry. Co.* v. *Stringham,* 239 U. S. 44, and of the Eighth Circuit Court of Appeals in *Denver & R. G. R. Co.* v. *Mills,* 220

Fed. 481, and the uniform decisions of the highest courts of other States upon the same question, including:

Oregon Short Line v. *Stalker,* 14 Ida. 362, 94 Pac. 56;
Crandall v. *Goss,* 30 Ida. 661, 167 Pac. 1025;
Hurst v. *Idaho-Iowa Lateral Canal Co.,* 34 Ida. 342, 202 Pac. 1068;
Bowman v. *McGoldrick,* 38 Ida. 30, 219 Pac. 1063;

and for that the court erroneously held that the decision of the Supreme Court of the United States in *Smith* v. *Townsend,* 148 U. S. 490, was not in point, or in so far as in point was only dictum and not controlling.

IV.

In holding that petitioners' ancestor did not by virtue of the patent issued by the United States and his deed to the Choctaw Coal and Railway Company of a right of way with express provision for the reversion thereof to the grantors, their heirs or assigns, in event it ceased to be used for railroad purposes, acquire or have any title to said reversion, but that the title thereto was in the United States and was subject to disposal by Acts of Congress prior to abandonment of the right of way by the railroad company, and that Congress did by the general Act of March 8, 1922, 42 Stat. 414, convey said reversion to the City of Oklahoma City subject to the railroad use, and that the said City succeeded to the whole title to the land involved by virtue of said Act upon the abandonment thereof for railroad purposes, for that said Act has no application in this case because it expressly provides that the reversion in a right of way to which it applies, and the whole title to the land upon abandonment for railroad purposes, shall vest in the municipality where it is situate "by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatso-

ever", and the only patent thereto by virtue of which title could so pass was the patent from the United States to petitioners' predecessors in title, for there never was a patent from the United States to the municipality, and whatever title might pass "by virtue of the patent" would of necessity pass to petitioners' predecessors in title who were the only patentee.

Summary of Argument.

The petitioners rely on the following propositions in support of their petition:

I.

The Act of Congress of February 18, 1888, as amended by the Act of February 13, 1889, was not a grant *in præsenti* of a right of way to the Choctaw Coal & Railway Company, but was merely a grant of the right to acquire a right of way by purchase or condemnation through Indian Country only, the title thereto not to vest until taken and paid for as in the Act prescribed, which proposition is established:

(a) By the language of the Act itself.

(b) By the fact that the land across which the railroad was to be located was owned in fee simple by Indian Tribes and Congress was without constitutional authority to take their private property and grant it by legislative enactment to a railroad company either for its private benefit or for public use.

(c) By congressional and departmental construction of the Act.

(d) By judicial construction of precisely the same language in other Acts of Congress of precisely the same character.

II.

A possessory right or title was acquired by the settlers on lots in the townsite of Oklahoma City on April 22, 1889, and by the homesteader on the Higgins land on the same date, which was prior and superior to every claim of right or title thereto which had not previously vested in someone else, except that of the United States, and which right or title of said settlers and said homesteader was afterwards matured by patent from the United States into a fee simple title.

III.

The title which the Choctaw Coal & Railway Co. was authorized under the Act of Congress, whether a grant *in præsenti* or not, to take in the land constituting its right of way, was a railroad easement or limited fee for railroad purposes, with the underlying fee or reversionary right in the land so taken in the Indian Tribe from which taken, and in the United States after the land was ceded to it by the Indian Tribe and became a part of the public domain, and in the settler or homesteader when the land was patented to him by the United States.

IV.

The provisions of the Choctaw Railway Act were inoperative in the public domain, or if operative therein were not exclusive and mandatory, but the Railway Company could decline to take its right of way under that Act and could acquire a right of way by purchase or condemnation of lands of settlers and homesteaders, if it chose, and in these cases it did, in compromise settlement of a substantial *bona fide* legal controversy and for a valuable consideration, in fact abandon its claim to a right of way under the Act across the land here involved, and did in fact acquire such right of way

by purchase from individual owners to whom the full fee simple title had been conveyed by the United States, and did in fact take title to such right of way by deed containing the express provisions that upon abandonment of the land for railroad purposes the full title thereto should revert to the grantors, their heirs and assigns, whereby it estopped itself to deny its grantors' title, or to claim title thereto derived from any other source, and bound itself to recognize and maintain its grantors' title.

V.

The City of Oklahoma City acquired no title or right to the abandoned right of way of the railroad company under the Act of March 8, 1922, 42 Stat. 414, providing for the disposition of abandoned or forfeited railroad rights of way granted through public lands, and if that Act be construed to grant the right of way here involved to said City then it is violative of the Fifth Amendment to the Constitution of the United States.

ARGUMENT AND AUTHORITIES.

First Proposition.

The Act of Congress of February 18, 1888, as amended by the Act of February 13, 1889, was not a grant *in præsenti* of a right of way to the Choctaw Coal & Railway Company, but was merely a grant of the right to acquire a right of way by purchase or condemnation through Indian Country only, the title thereto not to vest until taken and paid for as in the Act prescribed, which proposition is established:

(a) The proposition stated is supported by the language of the Act itself.

It is elementary that in construing a legislative act the first step is an examination of the language of the act it-

self. Reference is made to page 26 of the Record, where the Act is printed in full.

It will first be observed that its title is:

> "An Act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory, and for other purposes."

There is a careful avoidance of the word "grant" in this title. It is not denominated a grant and does not purport to grant a right of way, but merely confers authority. The extent and limitations of this authority and the manner of its exercise are set out in the body of the Act itself. While the title is not a part of the Act, nevertheless the language of it is significant as to the intention of Congress.

The Act itself contains no granting word nor any word that imports a present conveyance of title. It provides (Section 1) that the railway company is "invested and empowered with the right of locating, constructing, owning, equipping, operating, using and maintaining a railway, etc.," and (Section 2) that the corporation is "authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width * * * and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road, etc." This language in its ordinary meaning and interpretation does not import a grant of immediate title. It is merely the granting of authority, and power.

In *United States* v. *Ft. Smith & Western Ry. Co.*, 195 Fed. 211 (8th C. C. A.), Judge Sanborn refers to the Act as the grant of a "franchise to construct, etc." This case is quoted herein *infra*.

Again the act does not purport to be an immediate and completed grant or donation of right of way and station grounds, but authorizes the taking thereof by certain pro-

cedure and upon compensation for what is actually taken.

Section 3 provides for compensation to "individual occupants according to the laws, customs and usages of any of the Indian nations or tribes," for their property taken or damaged before the same can be taken for a right of way. The method of ascertaining the amount of such damages is prescribed in detail and these must be ascertained and paid in advance of the taking.

Section 5 provides that the railway company shall pay to the Secretary of the Interior for the benefit of the Nation or Tribe of Indians through whose lands the railway is located, the sum of $50.00 per mile, in addition to the compensation for property taken and damage done to individual occupants by the construction of the railway, and that if the Nation or Tribe was dissatisfied with such allowance, then the compensation to be paid for the right of way taken should be determined by three disinterested referees from whose award either party might appeal to the United States District Court at Fort Smith, Arkansas, or for the Northern District of Texas, which court should determine the subject matter according to the *laws of the State* in which the case was heard *for determining damages when property is taken for* railroad purposes. This language can only mean provision for the acquisition of a right of way by condemnation proceedings and full compensation for the land taken. This is additional compensation for the right of way to be taken.

Section 6 provides that the railway company shall file location maps in the office of the Secretary of the Interior and in the office of the chief of each of the nations or tribes through whose lands the railway may be located, and that after the filing of such maps "no claim for a *subsequent* settlement and improvement upon the right of way shown by said maps shall be valid as against said company."

If the act were a present grant of title, then the railway company would not be required to pay for any settlement or improvement on the line of its road *subsequent to the enactment of the law.* But to the contrary there is specific provision that it must pay for all individual rights and compensate all individual damages by reason of occupation, settlement and improvements in advance of the filing of its location map, even though these are *subsequent to the enactment of the law.*

In the Indian Country there was no private ownership of land and the only individual rights to be compensated were those of settlement and improvement. But after the land became public domain and title to it in severalty could be and was acquired by individual owners, then the rights to be paid for and damages to be compensated upon location of the road across such land included not only all settlement and improvement rights and property, but title to the land itself. This shows that the act was never intended to apply to land in the public domain.

(b) The proposition stated is supported by the fact that the land across which the railroad was to be located was owned in fee simple by Indian Tribes and Congress was without constitutional authority to take their private property and grant it by legislative enactment to a railroad company either for its private benefit or for public use.

The location of the line of road authorized in the Act of February 18, 1888, from a point on Red River to a point south of the center of the west boundary of Arkansas was entirely in Choctaw and Chickasaw country. These tribes owned their land by a fee title under treaty grant and patent conveyance from the United States. Article II, Treaty of Dancing Rabbit Creek, September 15, 1830, 7 Stat. 333;

Article I, Treaty of Washington, June 22, 1855, 11 Stat. 611.

The Creeks likewise held their lands by a fee simple title. By the Treaty of Washington, January 24, 1826, 7 Stat. 286, the Creek Nation ceded to the United States part of their land in Georgia and the United States agreed to purchase for them a country west of the Mississippi to which they might remove.

By Act of Congress of May 28, 1830, 4 Stat. 411, the President was authorized to exchange land belonging to the United States west of the Mississippi River for land of the Creek Indians to the east thereof, and it was provided that in event of such exchange the "United States will forever secure and guarantee to them, and their heirs and successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same," but with the proviso that such lands should revert to the United States if the Indians should become extinct or abandon them.

By the Treaty of Washington, March 24, 1832, 7 Stat. 366, the Creek Indians ceded to the United States all their land east of the Mississippi and the United States ceded to them a country west of the Mississippi under a solemn guaranty of such country to them and that it would "cause a patent or grant to be executed to the Creek Tribe."

By the Treaty of Fort Gibson, Indian Territory, February 14, 1833, 7 Stat. 417, the boundaries of the Creek Country were defined as between the Creeks and the Cherokees, and the United States again promised to "grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention."

Pursuant to that treaty, under date of August 11, 1852, a patent was executed by Millard Fillmore, President of the United States, to the Creek Nation, conveying their

lands described, which patent is recorded in Vol. 4 of Indian Deeds in the Office of Indian Affairs, pages 446 and 447 (R. 136).

By the Treaty of Washington, August 7, 1856, 11 Stat. 699, the boundary between the Creek Country and the Seminole Country which had been in dispute was settled and by Article 3 the United States solemnly guaranteed "to the Creek Indians, the lands included within the boundaries defined in the second article hereof * * * by the same title and tenure by which they were guaranteed and secured to the Creek Nation by the fourteenth article of the Treaty of March 24, 1832, the third article of the Treaty of February 14, 1833, and by the letters patent issued to the said Creek Nation on the 11th day of August, 1852."

By the Treaty of Washington, June 14, 1866, 14 Stat. 785, the Creeks for a consideration of $975,168.00, ceded to the United States the western half of their entire domain in trust "to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon." They continued to hold the eastern half—lying east of the line between what is now Lincoln County and Creek County in the State of Oklahoma—by a fee simple title.

This was the condition of the Indian title to the land through which the Choctaw Railway Company was authorized to construct a railroad under the Acts of 1888 and 1889 at the time those Acts were enacted. All of it was fee title except the western half of the Creek domain, and this was held in trust by the United States for a specific purpose which did not include the granting of any of it to a railroad company for a right of way.

Under the Fifth Amendment to the Constitution, Congress was without power to take the private property of these Indian Tribes and transfer it by legislative act to a

railroad corporation to be used for railroad purposes, so that by operation of such legislative act alone the Indian Tribe would be divested of title.

It is an elementary rule in the construction of statutes that if a statute is susceptible of two interpretations, under one of which it will be unconstitutional and void and under the other of which it will be constitutional and valid, the latter must be accepted. Here the contention that the Choctaw Railway Act was a grant of a present vested title to a right of way effective on the enactment of the law, is not only contrary to the ordinary meaning and plain import of the language used, but would render the act contrary to the constitution and void, and hence no such construction can be placed upon it.

(c) The proposition is supported by Congressional and Departmental construction of the Act.

A search of the statutes at large reveals that beginning with August 2, 1882, and ending with February 28, 1902, Congress enacted 38 special acts authorizing various railroad corporations to acquire a right of way through the Indian Territory. The St. Louis and San Francisco Act of August 2, 1882, 22 Stat. 1881, the Gulf, Colorado & Santa Fe Act, 23 Stat. 69, and the Southern Kansas Act, 23 Stat. 73, being the first three of these, are each entitled "An Act to grant a right of way, etc.," and in the text of each it is provided that "a right of way is hereby granted." The form of the St. Louis and San Francisco Act is quite different from all those that follow, but in substance it is the same. Beginning with the Gulf, Colorado & Santa Fe Act, Congress adopted a form for such acts which is followed almost literally, except as to the name of the company and the termini and location of the road, in the remaining 36 acts. But in the fourth of these special acts, the Kansas & Arkansas Valley Act, 24 Stat. 73, the language of the title

is changed from that used in the three preceding ones by omitting the words "to grant," and making it read instead "An Act to authorize, etc." A similar change is made in the text of the act itself, so that instead of reading "a right of way is hereby granted," it reads that the company "is authorized to take and use for all purposes of a railway, etc." This change of language in title and in text is followed in all the subsequent acts. It seems evident that Congress regarded the word "grant" as inappropriate and misleading, because no grant was intended and none was in fact made, and so, in order to use appropriate and unambiguous language, substituted the expression "authorized to take" for "granted." The change certainly is significant, else why was it made.

Congress in later legislation in respect of this same act adheres to the idea that it is merely a grant of the right to acquire a right of way. In the Act of August 24, 1894, 28 Stat. 502, the creditors and stockholders of the Choctaw Coal and Railway Company, which had become insolvent, were reorganized into a new corporation created by that act and were given the property and the rights and privileges of the original corporation. The new corporation became known as the Choctaw, Oklahoma & Gulf Railway Company. Section 4 of this act provides as follows:

> "That it shall and may be lawful for such new corporation to construct and operate branches from its said railroad and for such purpose to take and use rights of way not exceeding one hundred feet in width upon making compensation therefor as provided in the case of taking land for its main line * * *: Provided, that the *right to construct branches conferred by this section* shall exist and be exercised *in the Indian Territory only* for the purpose of developing the leases mentioned, etc." (Italics supplied.)

This provision merely *makes lawful* and *confers the right* for construction of these branches upon the same terms as for "taking land for its main line."

Again by Section 2 of the Act of April 24, 1896, 29 Stat. 98, it is provided that the company may build branches to its coal mines and that the powers conferred upon it shall extend "to the construction and operation of a branch from any point on its existing line of railroad to the northern line of the State of Texas, and for this purpose the said company shall have the like rights, powers and franchises *as to the acquisition of a right of way and depot grounds,* and as to the construction and operation of the said branch," as had been previously conferred (italics supplied). The provision that the company should "have the like rights, powers and franchises as to the *acquisition* of a right of way and depot grounds" is a significant indication that Congress considered the original grant to be not of a vested title to a right of way, but only of rights, powers and franchises *to acquire* a right of way and depot grounds.

Again on March 28, 1900, 31 Stat. 52, Congress passed an Act entitled: "An Act enlarging the powers of the Choctaw, Oklahoma and Gulf Railroad Company." Section 2 provides that the *powers conferred* by previous legislation,

> "shall be so construed as to authorize the construction and operation of the railroad and branches thereby or hereby authorized through and over any Indian reservations, subject to the payment of compensation provided for in such Acts as to the land in the Indian Territory, and through and over any Indian allotments, subject to the compensation provided by the laws of Oklahoma."

This was an act, not curtailing, but enlarging the powers of the company. It refers, not to former grants, but to

powers conferred, and provides that these shall be "so construed as to *authorize* the construction of branches *subject to the payment of compensation*, etc."

This legislation bears out the interpretation of the original Act that it was a grant of powers and authority and not of title, and that it was intended to be and was applicable only to the Indian Territory or to Indian reservations where the land was owned by a tribe in common, and was not applicable to a case where an individual title in severalty had attached to a particular tract of land. Thus where a right of way is taken across an Indian allotment, the compenstion to the Indian allottee is not to be subject to the provisions of the act, but to that provided by the laws of Oklahoma. By analogy when a portion of Indian Territory was by act of Congress made a part of the public domain and opened to settlement under the homestead law and a homesteader acquired title, or an inchoate title, to a particular tract of land, then the company's right to locate a right of way across his land was "subject to the compensation provided by the laws of Oklahoma." This is in accord with the view of President Harrison in his veto message of the Oklahoma City bond bill, and of Justice Van Devanter in his opinion as an Assistant Attorney General, and of the Eighth Circuit Court of Appeals in *United States v. Ft. Smith & W. R. Co.*, 195 Fed. 211, to all which further reference is made below.

The Oklahoma Supreme Court in its decision quotes a garbled excerpt from Section 12 of the Act of March 2, 1889, 20 Stat. 1003, to the point that that Act indicates a Congressional construction of the Choctaw Railway Act as a grant *in præsenti* of a right of way. The full text of the excerpt partly quoted is that the release and extinguishment of the Indian rights,

> "shall not inure to the benefit of or cause to invest in any railroad company any right, title, or interest what-

ever in or to any of said lands, and all laws and parts of laws so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands and interest or right therein now existing in or on behalf of any railroad company, except rights of way and depot grounds, are hereby declared to be forever forfeited for breach of condition."

The quotation is logically and grammatically divided into two parts. In the first part it is declared that the release conveyance by the Creeks and Seminoles and the extinguishment of their title:

> "Shall not inure to the benefit of or cause to vest in any railroad company, any right, title or interest whatever in or to any of such lands, and all laws and parts of laws, so far as they conflict with the foregoing, are hereby repealed."

The ordinary interpretation and meaning of this language is that no railroad company which had been authorized to construct a railroad through these Indian lands and granted the power of eminent domain to condemn and take a right-of-way therefor should profit by the extinguishment of the Indian title, nor be permitted to claim that title to its authorized right-of-way thereby vested free of the Indian title and right to compensation, and free of all obligation to acquire title in a lawful manner from the United States or any other successor in title to the Indians. Instead of this provision recognizing the Choctaw Railway Company's authorized right-of-way as a grant of title *in præsenti*, as the Court held, it does exactly the contrary and wholly refutes and denies that conclusion.

The second part of the quotation provides that:

> "All grants or pretended grants of said lands, or any interest or rights therein now existing in or on behalf

of any railroad company, except rights-of-way and depot grounds, are hereby declared to be forever forfeited for breach of condition."

It is difficult to see any support in this language for the contention that the Choctaw Railway Act grants a right-of-way *in præsenti*. There is no reference to any specific railroad company. It plainly indicates that there had been grants or pretended grants of lands, or interests or rights therein, to railroad companies, other than for a right-of-way, for it is these grants which are expressly forfeited. Rights-of-way and depot grounds are excepted from the forfeiture clause.

The Oklahoma Supreme Court further in support of its claim that subsequent Acts of Congress have indicated a congressional construction of the Choctaw Railway Act as a grant *in præsenti* of a right of way quotes a part of Section 18 of the Organic Act, approved May 2, 1890, 26 Stat. 81. The full text of this statute on the point to which quoted is as follows:

"No part of the land embraced within the Territory hereby created shall inure to the use or benefit of any railroad corporation, except the rights of way and land for stations heretofore granted to certain railroad corporations. Nor shall any provisions of this Act or any act of any officer of the United States, done or performed under the provisions of this Act or otherwise, invest any corporation owning or operating any railroad in the Indian Territory, or Territory created by this Act, with any land or right to any land in either of said Territories, and this Act shall not apply to or affect any land which, upon any condition on becoming a part of the public domain, would inure to the benefit of, or become the property of, any railroad corporation."

This language is neither a reservation of land for the benefit of any railroad company, nor a grant of land to it, but is a mere repetition of the denial contained in the Act of March 2, 1889, of any right or title in railroad corporations to any land except their rights of way and station grounds previously granted. The obvious purpose of this provision is to preserve the *status quo*. The plain intent is that no railroad corporation should acquire anything by virtue of the Act that it did not have before, nor in any way profit or gain by the Act, and equally that it should not be denied or deprived of any property or property right which it had before.

In the construction of a statute, it is proper and often helpful, in event of any doubt as to its meaning, to resort to the debate on it in the legislative body which enacted it for an expression of the intention of the legislators.

Referring to the Congressional Record, we find that the bill for the Act of February 18, 1888, was introduced in both Houses of Congress at about the same time and in each was referred without debate to the Committee on Indian Affairs. In each body this committee soon reported recommending its passage with amendments. The Senate accepted the amendments, passed it and sent it to the House. The principal amendment made by the Senate was the insertion of the following language in Section 1:

> "also, a branch of railway to be constructed from the most suitable point on said main line for obtaining a feasible and practicable route in a northwesterly direction to the leased coal veins of said Choctaw Coal and Railway Company in Tobucksey County, Choctaw Nation;"

When the bill came up in the House Mr. Allen of Mississippi was in charge. There was some debate as to whether the compensation provided for the Indians was adequate

and the provision for appraisers for fixing additional compensation was satisfactory, but the principal discussion was as to the amendment authorizing a branch line to the company's coal veins. On this the following occurred:

"Mr. Weaver: And that this is a proposition to condemn this right of way for this spur line 18 miles long. Therefore, it is a proposition to condemn land for the benefit of a corporation and not for the benefit of the public, because it is a private corporation that owns those coal lands. I am not making objection to the bill, but I suggest to the gentlemen the question whether we have the constitutional power to do that.

"Mr. Allen of Mississippi: I do not see any trouble about the constitutional power if we have the right to condemn land for railroad purposes. This branch is to be a public road and is to be under the same limitations as to the rights of the public as the main line. There will be no distinction on that point. This branch will be just as much a public highway, and the public will have a right to transport their property over it and to travel over it the same as over the main line."

* * * * * * *

"Mr. Holman: * * * The other point is that this spur road, 18 miles long, which runs into the land owned jointly by the Choctaws and Chickasaws, is really in the nature of a private enterprise, and this bill proposes to confer upon this corporation powers of eminent domain, so to speak, to appropriate the property of these Indians, subject to certain conditions, for the benefit of a purely private enterprise. This is the matter to which I wished particularly to call the attention of the gentleman from Mississippi."

Mr. Allen explained that the public would be interested, and the Indians particularly, in the development of the coal veins and the transportation of coal over the proposed branch, and the bill passed as amended without a

roll call. Congressional Record, 50th Congress. 1st Session, Vol. 19, Part 2, p. 1115.

From the foregoing it seems clear that Congress in the enactment of the law regarded it, not as a present grant of a right of way, but as conferring upon the company the power of eminent domain for the acquisition of a right of way by condemnation. This power could only be conferred for a public purpose and doubt was expressed whether the branch line was a public instead of a private purpose. The main line was admittedly a public purpose and no doubt existed of the propriety of conferring the power of eminent domain as to it.

The executive department of the Government has also had occasion to construe and interpret the Choctaw Railway Act. Attention is called to the message of President Harrison dated January 26, 1891, vetoing the act to authorize Oklahoma City to issue corporate bonds to the amount of $40,000 for the purpose of providing a right of way for the Choctaw Railway Company through the city. This message appears in full in the Record beginning at page 220. The President pointed out that "no legal location was made by the railway company prior to the acquisition of the land by occupying settlers," and that if the company claimed under the general statute of the United States providing for a railroad right of way through public domain to any railroad complying with its provisions, 18 Stat. 482, then that statute distinctly saved the right of any settler who had located prior to the filing of the location map of the road and its approval by the Secretary of the Interior, and that if the company claimed under the Choctaw Railway Act of February 18, 1888, the provisions of that act plainly protected the right of any occupying claimant. Then he further expressed the opinion that this act, "was intended to grant a right of way only through Indian land, and if

these lands were not such, the general statute to which I have referred would apply; but in either event the conclusion would be the same." This for the reason that whether under the general Act of March 3, 1875, 18 Stat. 482, or under the Choctaw Act, a settler or occupying claimant whose settlement was made and whose rights attached prior to the filing of the map of location of the road was entitled to compensation for his rights, whatever they might be, before the company could acquire a right of way. Then the President indicates that the company was so devoid of any just claim to a right of way that its controversy with the lot settlers was only a sham, not a "real controversy, doubtful as to its issue."

We emphasize the point made that the act, judged by its terms, was intended to apply to *Indian land only.* So when the land here involved ceased to be Indian land and became part of the public domain and subject to occupation by settlers, then the Choctaw Railway Act by reason of the changed conditions could not be made to apply. It simply did not fit the conditions then existing. Its provisions were inappropriate and not workable under such changed conditions. The company's recourse then was to proceed under the general statute, 18 Stat. 482, now appearing as Section 934, Title 43, U. S. Code.

In 1898 the Choctaw Railroad Company was building its line westward from Fort Reno and sought a right of way across allotted lands of the Cheyenne and Arapaho Indians. It contended that the Choctaw Railway Act, as amended, granted it the right of way across these allotments and that its title under such grant vested at the enactment of the act and hence was prior in time and superior in right to the title of the allottees. It offered to pay the Indian allottees for their improvements, but contended that the Indian allottee had no valid claim for compensation for the right of way across his land. In this situation the Secretary of

the Interior applied to the Attorney General for an opinion on the legal question involved. This opinion was prepared by Willis Van Devanter, then Assistant Attorney General of the United States and now Associate Justice of the Supreme Court of the United States. It is reported in Volume 27 of Decisions of the Department of the Interior Relating to Public Lands (Land Office Decisions) 414.

We point out by way of emphasis that Justice Van Devanter took the view that the language of the Choctaw Railway Act was "not of an absolute grant *in praesenti* of a right of way," and that the company was merely "authorized to employ the government's power of eminent domain," and also that by the language of the act it was applicable only while the land remained Indian lands;

> "The plan provided for ascertaining the damages is not practicable under the changed conditions of the title to the land and the people holding it. These people are now citizens of the United States, and hold their lands under an assurance from the United States of a future conveyance and not under the usages and customs of any Indian Tribe."

So when the land involved in these lawsuits ceased to be Indian land and not held under the usages and customs of any Indian Tribe, and became public domain of the United States, and citizens of the United States settled upon and occupied it and acquired rights in it, and took such steps under the law as gave them assurance from the United States of a future conveyance of the fee title, then the conditions had so changed that the provisions of the Choctaw Act were no longer applicable, and the only recourse of the railway company to acquire title through the public domain was the general statute of March 3, 1875, which expressly made the rights of homesteaders and settlers, where prior in time, superior to the right acquired by a railroad company upon filing a map of location of its road.

Further argument on this point would be only a restatement of what Justice Van Devanter has already so forcibly said in the opinion cited. We earnestly ask the Court to read that opinion in full. It construes the identical Act here under consideration and has stood as the law for over 35 years. And it presents the petitioners' case better than their counsel can possibly present it here.

(d) The proposition stated is supported by judicial construction of precisely the same language in other Acts of Congress of precisely the same character.

In the case of *Cherokee Nation* v. *Southern Kansas Railway Company*, 33 Fed. 900, the Court had before it for consideration the Southern Kansas Railway Act granting a right of way through the Indian Territory. This act, already referred to herein, is literally identical with the Choctaw Railway Act, except as to the name of the railway company concerned and the termini and location of the proposed road, and except that in the Southern Kansas Act the title and text use the expression "grant" of a right of way while in the Choctaw Act the expression is "authorized to take and use" a right of way. From the language of the two acts, it would appear that if either could be construed to be a grant of vested title *in praesenti* to a right of way, it would be the Southern Kansas Act.

Under that act the Southern Kansas Railway Company was about to build south from Kansas through part of the Cherokee Nation the line of road which is now the Santa Fe through Oklahoma City. The Cherokee Nation filed a bill in equity to enjoin the road from coming through its country. Its principal contention was that the Cherokee Nation was a sovereign state owning its land in fee, and that the Congress of the United States was without authority to exercise, or to grant the right to exercise, the power of eminent domain over land within its boundaries

and take any of such land for public use. The court set out the substance of the Act of Congress involved, and after an exhaustive discussion of the subject of the right and function of the power of eminent domain, denied the bill. It held that Congress had the right to exercise the power of eminent domain, and hence to grant it to a corporation to exercise, for a public use, and that a railroad was a public use.

In the opinion it is said:

> "The controlling question in this case is, did the Congress of the United States have the right to grant to defendant a right of way for its railroad across or over the land of the Cherokee Nation, the defendant paying the nation for the same, and the individual occupants for their improvements? * * * Congress can only have this right, either because the title of this real estate is in the United States, or because the government of the United States can exercise what is called the 'right of eminent domain,' and take the property, or authorize a railroad to take it, on its paying just compensation to the owners, by the exercise of the power growing out of this right. This Court held in *U. S.* v. *Reese*, 5 Dill. 405, and in *U. S.* v. *Rogers*, 23 Fed. Rep. 658, that the title to the lands of the Cherokees was obtained from the United States by grant. This title is a base, qualified, or determinable fee, without right of reversion, but only the possibility of reversion, in the United States. This, in effect, puts all the estate in the Cherokee Nation. This is in substance the principle declared by the Supreme Court of the United States in *Holden* v. *Joy*, 17 Wall. 211. *Congress could not, therefore, without the consent of the Cherokee Nation, and individual occupants of its land, grant to defendant this right of way because the United States had title to the land, or because it was either a part of the public domain, or a reservation belonging to the government. If it can be done at all, it must be because the government of*

the United States can exercise, with reference to the lands of the Cherokee Nation, the right of eminent domain. If the government does not have this right, then the act of Congress purporting to grant the right of way is void, because of the absence of constitutional power to pass it.

* * * * * * *

"Congress, then, used this attribute of sovereignty in a proper case, when it permitted the defendant company, not to say when eminent domain should be exercised, but, as the agent of the public, to use the fruits or effects of the exercise of the rights as a means of constructing its road, to promote the public interest." (Italics supplied.)

The Cherokee Nation appealed this case from the District Court to the Supreme Court of the United States. That Court in its decision copies the entire railway act involved, and after a most exhaustive discussion, in an opinion by Justice Harlan, upholds the act as a proper exercise of the power of eminent domain. *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U. S. 641, decided May 19, 1890. The portion of this decision applicable here is that which holds that the act merely confers upon the railway company the right and power to purchase and acquire a right of way through the Indian country by condemnation proceedings, and that no title to such right of way vested in the railway company until it had been located and paid for in the method prescribed by statute. We quote from the opinion as follows:

"In view of these authorities, the contention that the lands through which the defendant was authorized by Congress to construct its railway are held by the Cherokees as a sovereign nation, without dependence on any other, and that the right of eminent domain

within its territory can only be exercised by it, and not by the United States, except with the consent of the Cherokee Nation, cannot be sustained. The fact that the Cherokee Nation holds these lands in fee simple under patents from the United States is of no consequence in the present discussion; for the United States may exercise the right of eminent domain, even within the limits of the several states, for purposes necessary to the execution of the powers granted to the general government by the constitution. * * *

"In the present case the requirements of the constitution have, in our judgment, been fully met. The third section provides that, before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the company is required to pay into court double the amount of the award, to abide its judgment; and, that being done, the company may enter upon the property sought to be condemned, and proceed with the construction of its road.

"The plaintiff asks what will be its condition as to compensation if, upon the trial *de novo* of the question of damages the amount assessed in its favor should exceed the sum which may be paid into court by the defendant. This question would be more embarrassing than it is if, by the terms of the act of Congress, the title to the property appropriated passed from the owner to the defendant, when the latter, having made the required deposit in court, is authorized to enter upon the land pending the appeal, and to proceed to the construction of its road. *But clearly the title does not pass until compensation is actually made to the owner.* Within the meaning of the constitution the property, although entered upon pending the appeal, *is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.* Such was the decision in *Kennedy* v.

Indianapolis, 103 U. S. 599, 604, where the court construed a clause of the Constitution of Indiana declaring that no man's property 'shall be taken or applied to public use * * * without a just compensation being made therefor,'—substantially the provision found in the national constitution. This court there said that, 'on principle and authority, the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, *but that the title does not pass from the owner without his consent until just compensation has been made to him.*' In the case now before us the property in respect to which the referees made the award *will be conditionally appropriated for the public use when the defendant makes a deposit in court of double the amount of such award,* and it only remains to fix the just compensation to be made to the owner. *But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial de novo provided for in the statute.* So that, if the result of that trial should be a judgment in its favor in excess of the amount paid into court, *the defendant must pay off the judgment before it can acquire the title to the property entered upon, and failing to pay it* within a reasonable time after the compensation is finally determined, *it will become a trespasser, and liable to be proceeded against as such;* and, in such case, if the plaintiff shall sustain damages by reason of the use of its property by the defendant pending the appeal, the latter must be liable therefor. The apprehension, therefore, that the plaintiff may lose its property without receiving just compensation therefor is without foundation.''

The following reasoning must be true. The proper and only possible construction of the Choctaw Railway Act at the time of its enactment must be the construction of it at all times and places so long as it remains a law. It could not be given one construction in 1888 and another in

1889. It could not be given one construction in the Choctaw and Chickasaw Country and another in the Creek Country. It could not be given one construction in the eastern half of the Creek domain and another in the western half. It could not be given one construction in the Indian Country and another in the public domain. And when enacted in 1888, being by its terms applicable only in Choctaw and Chickasaw Country, it could not properly or possibly be construed as a grant *in praesenti* of a right of way through that country. This for the reasons set forth in the *Cherokee Nation case, supra.* Neither could it, for the same reasons, be construed in February, 1889, as a grant *in præsenti* through the eastern half or the western half of the Creek domain, or, after March 1, 1889, the public domain.

In *United States* v. *Ft. Smith & W. R. Co.,* 195 Fed. 211, the Circuit Court of Appeals for the Eighth Circuit had before it for consideration the Fort Smith & Western Act of March 3, 1899, 30 Stat. 1368. This act is identical with the Choctaw Act in every respect except as to the name of the railway company and the termini of the proposed road.

The line of the road *was through lands of the Creek Nation.* After the act was enacted these lands were allotted in severalty to members of the Nation. In constructing its road the company purchased from the allottees and paid for the right of way and damages for improvements. Afterward the United States brought suit to recover the $50 per mile which the act provided the company should pay to the nation for its right of way through the tribal lands. The court held the act merely conferred the right of eminent domain and the right to acquire a right of way, and that by reason of the changed conditions when the land became allotted in severalty to members of the tribe, the provision for payment of $50 a mile to the nation was no longer applicable, and that the United States could not recover any-

thing on that ground for the benefit of the nation as a whole.

The opinion is also especially pertinent here because the court considers the case of *St. Joseph & Denver R. Co.* v. *Baldwin*, 103 U. S. 426, and holds that it has no application. It was upon authority of this case that the Supreme Court of Oklahoma Territory in the case of *Churchill* v. *The Choctaw Railway*, 4 Okla. 462, 46 Pac. 503, reached the conclusion that the Choctaw Act was a grant to the railway company of a vested title *in praesenti* to a right of way. And it was upon authority of both of these cases that the Supreme Court of Oklahoma based its decision in the instant cases.

In its opinion the Circuit Court of Appeals said:

> "By Section 1 of the Act of March 3, 1899 (Chapter 453, 30 Stat. 1368), *Congress granted to the railroad company the franchise to construct, maintain, and operate its railroad through the Creek Nation.* By Sections 2, 3, 4 and 7 it authorized that railroad company to exercise the power of eminent domain to take and use its right of way through that nation on condition that it should make full compensation to the owners and occupants of the the lands over which it was constructed therefor.
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> * * * * * * *
>
> "The right and title to the allotments over which the right of way is here in question had vested in the allottees under this legislation and the Creek Nation had parted with all its title thereto subsequent to the Act of March 3, 1899, granting to the railroad company its right to construct a railroad through the Creek Nation and prior to June 20, 1901, when the railroad company first filed its map of definite location of its railroad across these allotments. *The second, third and seventh sections of the act merely granted, not the right of way through these lands, but the right to exercise the power of eminent domain, the power 'to take and use*

*for all purposes of a railway * * * and right of way,'* upon condition that full compensation should be made, first, to the nation for injury to its title, and, second, to individuals for injury to their improvements and their rights of occupancy.

* * * * * * *

"But counsel cites decisions in *Railroad Company* v. *Baldwin*, 103 U. S. 426, 430, 26 L. Ed. 578; *Nielson* v. *Northern Pacific R. Co.*, 184 Fed. 601, 106 C. C. A. 581, and in like cases to the effect that the grants of rights of way there considered were *in praesenti*, and all parties taking public lands subsequent to those grants took subject to them, and he argues that the grant in the act of March 3, 1899, was of the same character, that it vested in the railroad company the right of way over these allotments at the time it was enacted, that this right of way was reserved from these allottees by Section 24 of the Act of March 1, 1901, and that the allottees took no title to the land on which it was subsequently located, but that title remained in the Creek Nation. *The grants under consideration in the cases cited, however, were absolute grants by the United States of rights of way over lands which the United States owned. It did not own the lands of the Creek Nation, and its Act of March 3, 1899, did not grant any right of way through them. It merely gave to the railroad company the power of eminent domain*, the power to take a right of way over these lands from third parties, and the occupants of them upon payment of full compensation to them therefor. *The right of way under this act, therefore, never vested in the railroad company until it filed its map of definite location* on June 20, 1901, *and made or secured to the owners and occupants payment of compensation for its taking.*" (Italics supplied.)

Must not the language in the Choctaw Railway Act, identical with the language of the Ft. Smith and Western Act

construed and applied in the foregoing case to lands in the Creek Nation, be given the same construction and application in the instant cases?

The Supreme Court of Oklahoma cites decisions of the Supreme Court of the United States in support of its holding in these cases that the Choctaw Railway Act granted a title vesting *in praesenti*, but the cases cited deal with grants of a right of way through the public domain in language wholly different from that of the Choctaw Railway Act. Yet for some reason the Oklahoma court entirely ignores the difference in the language of the Acts.

The case of *Missouri, K. & T. R. R. Co.* v. *Kansas Pac. R. R. Co.*, 97 U. S. 491, is cited. There the Court refers to the Act under consideration as follows:

> "Its language is, 'That there be and is hereby granted' to it the odd sections mentioned; words which import a grant *in præsenti* and not one *in futuro*, or the promise of a grant."

The case of *St. Joseph & D. C. R. Co.* v. *Baldwin*, 103 U. S. 426, is cited. The Act of Congress there under consideration reads as follows:

> "That the right of way through the public lands, be and the same is hereby, granted, etc."

Of this language the Court said that it is:

> "In terms of a grant *in praesenti*. The Act is a present grant."

The case of *United States* v. *Southern Pacific Railroad Co.*, 146 U. S. 570, is cited. There the Court said of the Acts under consideration:

> "The grants to both the Atlantic & Pacific and the Southern Pacific Companies were grants *in praesenti*.

> The language is, 'there be, and hereby is, granted.' The construction and effect of such words of grant have often been considered by this court."

All the cases cited by the Oklahoma court to this point are of the same character and there is no need to consider more of them. The error in relying on decisions construing Acts of Congress, which in the plainest language purport to give an immediate vested grant, in support of the holding that the Choctaw Railway Act, being entirely different in language and having no expression or word therein indicating a grant *in praesenti*, should be given the same construction, is too obvious for comment.

Second Proposition.

A possessory right or title was acquired by the settlers on lots in the townsite of Oklahoma City on April 22, 1889, and by the homesteader on the Higgins land on the same date, which was prior and superior to every claim of right or title thereto which had not previously vested in someone else, except that of the United States, and which right or title of said settlers and said homesteader was afterward matured by patent from the United States into a fee simple title.

It is shown by the evidence in these cases that on the stroke of 12 o'clock noon on April 22, 1889, there was a rush of settlers into that part of the public domain termed Oklahoma Territory, then opened to settlement by previous proclamation of the President. In an incredibly short time thousands of people swarmed over the area which they expected to become, and which did become, the original townsite of the city of Oklahoma City, and staked and occupied town lots there. Likewise thousands of quarter sections of land were occupied and staked by homesteaders. These facts are a matter of history, as well as of

record in these cases, and the Court will take judicial notice of them.

Smith v. *Townsend*, 1 Okla. 117, 133, 29 Pac. 80;
City of Guthrie v. *Beamer*, 3 Okla. 652, 673, 41 Pac. 647.

Under the law applicable to the public domain generally the lot claimants who on April 22, 1889, staked and occupied lots in the contemplated townsite of Oklahoma City acquired a possessory right and title to such lots which was good against all the world except the United States. The title remained, of course, in the United States and subject to disposition by it, and as against it the lot claimant acquired no legal right. His possessory right was the subject of bargain and sale and of contracts with respect thereto which were valid. This because it was the uniform policy of the United States to recognize the rights of such claimants and to give them a preference in acquiring and perfecting title to the lot when the land was sold or offered for sale, or became subject to entry as a townsite. This principle of law is not controverted by the respondent in these cases:

Cofield v. *McClelland*, 16 Wall. 331;
Lamb v. *Davenport*, 18 Wall. 313;
Hussy v. *Smith*, 99 U. S. 22;
Stringfellow v. *Cain*, 99 U. S. 610;
Connor v. *Pratt*, 99 U. S. 619;
City of Guthrie v. *Beamer*, 3 Okla. 652, 41 Pac. 647.

Where a settler on public land subsequently obtains a patent for the tract settled upon, such patent relates back as a conveyance of title to the inception of the right of the patentee.

Deffebacke v. *Hawke*, 115 U. S. 392;
Davis v. *Wiebold*, 139 U. S. 507.

So in the *Higgins* case the right to the patent ultimately obtained was originated by the occupation and staking of the Higgins homestead on April 22, 1889, and the subsequent attempted filing of a homestead entry thereon which was matured into a patent by successfully contesting all other claimants.

So in the *Noble* case the original occupant and claimant of the lot in question had a prior and superior right and title to all others except the United States, and this became a perfected fee title when the United States issued its patent to the townsite trustees and they in turn issued their trustees' deed to Naoma Noble.

It was conceded in the trial court and in the Supreme Court below that unless the Railway Company's title to its claimed right of way through the Oklahoma City townsite vested instantly under the Act of Congress, then its title thereto was not prior and superior, but was junior and inferior, to the claims of the petitioners' predecessors in title. If the Railway Company's title was dependent upon the location of its right of way before vesting, then no valid location had been made at the time of the Opening.

Third Proposition.

The title which the Choctaw Coal & Railway Co. was authorized under the Act of Congress, whether a grant *in præsenti* or not, to take in the land constituting its right of way, was a railroad easement or limited fee for railroad purposes, with the underlying fee or reversionary right in the land so taken in the Indian Tribe from which taken, and in the United States after the land was ceded to it by the Indian Tribe and became a part of the public domain, and in the settler or homesteader when the land was patented to him by the United States.

The title which a railroad company takes to its right of way is a peculiar estate. It is an estate in land unknown to the common law and confusion has resulted by designating it with the name of a common law estate and assuming that it carried with it the attributes and characteristics of the common law estate with the name of which it was labelled. It has been most generally termed an easement, yet it is more than the common law easement of way. In United States courts it was formerly termed an easement, *Smith* v. *Townsend,* 148 U. S. 490, but it is now held to be a fee upon limitation similar to, though perhaps not precisely the same as, the common law base, qualified or determinable fee.

In *New Mexico* v. *United States Trust Company,* 172 U. S. 171, 183, there is a comprehensive discussion of the nature of a railroad right of way. It is there pointed out that the term "right of way" has a twofold significance. Sometimes it is used to mean the mere intangible right of passage over a tract of land, and at others to describe the strip of land itself upon which railroad companies build their tracks. The Court there concludes with respect to the character of estate in the strip of land itself as follows:

> "But, if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted—one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal property."

In *Rio Grande Western Ry. Co.* v. *Stringham,* 239 U. S. 44, the Court in reference to the grant of a right of way by Congress said:

> "A right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reversion in the event that the company ceases to use or re-

> tain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

In *Roxana Petroleum Corporation* v. *Jarvis,* 127 Kans. 365, 273 Pac. 661, 666, the court says:

> "While the term 'easement' does not accurately describe the interest, the term is precise enough when the purpose is to discriminate the interest in a general way from the totality of rights, privileges, powers, and immunities which constitute complete ownership. So considered, the phrase 'right of way' means an easement."

The petitioners contend that, even if conceivably the Choctaw Railway Act could be construed as a grant of title *in præsenti,* still there was an underlying estate in the land subject to the railroad's right of way, and that this servient estate would be an underlying fee, if the railroad's dominant estate was an easement, or a right of reverter, if the railroad's dominant estate was a limited fee, and that this servient estate was alienable and passed by patent, deed, will or inheritance just as any other interest in land would pass, and that it did pass by patent from the United States and by inheritance from the patentee to the petitioners.

In the oft cited case of *St. Joseph & Denver C. R. Co.* v. *Baldwin,* 103 U. S. 426, the Court by clear implication holds that, even where there is an absolute grant *in præsenti* of title to a railroad right of way through the public domain, the estate underlying such right of way remains in the United States, and the land remains part of the public domain subject to such right of way, and a homesteader and patentee from the United States across whose homestead the railroad has been or may thereafter be located acquires and owns this underlying estate subject to the incumbrance of the railroad right of way. Of the grant in that case the Court said:

> "The language of the Act here, and of nearly all the Congressional Acts granting lands, is in terms of a grant *in præsenti*. The Act is a perfect grant * * * 'There is hereby granted,' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the Act."

In the statement of the facts and the contentions of the parties it is said:

> "When the grant of Congress was made, the land claimed by the plaintiff was vacant and unoccupied land of the United States. But the line of the road over it was not definitely located until October, 1871. He acquired whatever rights he possesses in October, 1869. The defendant contends that the plaintiff took *the land subject to its right of way*. He contends that the grant of the right of way took effect only from the date at which the company filed its maps designating the route with the Secretary of the Interior. The District Court of the State agreed with him and gave judgment in his favor. The Supreme Court affirmed it, and to review it the cause is brought here." (Italics supplied.)

The contentions stated did not involve the underlying estate, but only whether the railroad company had prior right and title to a right of way over the plaintiffs' title, or whether it would be required to recognize his title as superior and acquire a right of way by purchase or condemnation. The question was whether he took his title *subject* to or free from the railroad right of way. The Court did not hold that the land within the boundaries of the right of way was wholly withdrawn and severed from the public domain and could not be conveyed by the United States to a patentee, but did hold that the patentee would take *subject to* the right of way. The Court said:

> "We are of the opinion, therefore, that all persons acquiring any portion of the public lands, after the

passage of the Act in question, *took the same subject to the right of way* conferred by it for the proposed road.''. (Italics supplied.)

So the very case on which the lower courts' decision in these cases ultimately rests negatives the contention that no title to the land within the boundaries of a railroad right of way under a grant *in præsenti* would pass by Government patent to a homesteader, but on the contrary clearly indicates that the full title to the entire tract covered by the patent would pass thereby, but *subject* to the easement or limited fee of the railroad right of way.

In *Smith* v. *Townsend,* 148 U. S. 490, the facts were that Smith was a section hand living on the Santa Fe right-of-way and depot grounds at Edmond, Oklahoma, at and prior to April 22, 1889. At 12 o'clock noon on that day he left the right-of-way and went upon a nearby quarter section and settled on it as a homestead. His right to file on it was denied on the ground that he was within the Oklahoma country prior to the opening and was thereby disqualified. He brought suit, alleging that he had resided on the railroad right-of-way and depot grounds, and that these were not part of the public domain thrown open to settlement, but were excluded therefrom by reason of their having been taken, appropriated and set apart for railroad uses, and that, therefore, since he had never been off these excluded lands prior to the opening, he was not disqualified as a homesteader on the ground of having previously been within the territory opened to settlement. The Supreme Court held against him and held that the railroad right-of-way and depot grounds were included in the public domain thrown open to settlement by the Act of Congress and the President's Proclamation. In the opinion, Justice Brewer, speaking for the Court, reviews the legislation pertaining to the subject, and then says:

"Construing the statute in the light of these observations, it will be noticed, first, that the provisions apply to the land collectively. The prohibition is against entering upon 'any part of said lands,' meaning thereby the whole body of lands, and in this body was included the right-of-way of the railroad company. The company had simply an easement, not a fee in the land * * *. In other words, the entire body of lands still remained Indian lands—the fee continued in the Indians, and all that the company received was a mere right-of-way. So, when the treaty of cession was made between the Creek Nation of Indians and the government it was a cession of all lands lying west of a certain line, with no exceptions; and it was this body of lands which was declared by the Act of March 1, 1889, to be a part of the public domain, and thereafter subject to homestead entries; and the proclamation of the President, naming the exact hour at which the lands should be open to settlement, describes a body of land by metes and bounds and makes no exception of the railroad right of way, though it does of two acres, specially described and reserved for governmental use and control. *Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract, subject to the easement of the company; and if ever the use of that right of way was abandoned by the railroad company, the easement would cease, and the full title to that right of way would vest in the patentee of the land.*" (Italics supplied.)

So here doubtless whoever obtained title from the Government to any land through which ran the Choctaw Railway right of way, whether before or after the location and construction of the road, would acquire a fee to the whole tract

"subject to the easement of the company; and if ever the use of that right of way was abandoned by the rail-

> road company, the easement would cease, and the full title to that right of way would vest in the patentee of the land."

The foregoing case arose in Oklahoma County in what had been the western half of the Creek Domain, and the right of way involved had been taken under the Act of Congress of July 4, 1884, 23 Stat. 73, authorizing the Southern Kansas Railway Co. to build a railroad through the Indian Territory south from the Kansas line. This is the same Act that is set out and construed in *Cherokee Nation* v. *United States*, cited and quoted *supra*. It is essentially the same as the Choctaw Railway Act.

In *Denver & R. G. R. Co.* v. *Mills*, 222 Fed. 481, the Eighth Circuit Court of Appeals had before it the precise question here considered of the effect of the abandonment by the railroad of a right of way granted by Act of Congress through the public domain, assuming for argument only that the Choctaw Act was such a grant. In that case the court said:

> "By act approved June 8, 1872, Congress granted to said railway company and its successors and assigns 'the right of way through the public domain one hundred feet in width on each side of the track,' together with certain adjacent lands, and also certain privileges similar to those granted to the Union Pacific Railroad Company."

The facts were that the railroad company built its road across a 320 acre tract later patented to the plaintiff or his predecessor in title. Years afterward it abandoned this part of its road and built a cutoff on a more direct or desirable location. Later it desired to use again the old right of way and denied that it had abandoned the same, but this question of fact was decided against it. Then the court had for consideration the question to whom the title to the

old right of way reverted upon such abandonment. In passing on this the court said:

> "Since there was an abandonment, the question arises to whom did the right of way revert? The original entries were made *subject to* the right of way. The patents were issued for the entire tract, but did not include the right of way so long as it was used for the purpose contemplated by the grant. *In the face of the patents, it cannot be said that the title reverted to the United States.* The estate of the railroad company was, to use the language of the *Townsend case,* 'a limited fee.' *Upon the extinction of that title by abandonment it was merged in the title held by those holding under the patentees.*" (Italics supplied.)

So here petitioners contend that when the railroad companies abandoned their right of way through Oklahoma City, "in the face of the patents, it cannot be said that the title reverted to the United States," but it must be said that upon such abandonment the whole title "was merged in the title held by those holding under the patentees."

In *Crandall* v. *Goss,* 30 Ida. 661, 167 Pac. 1025, the facts were quite similar to the case at bar. The Northern Pacific Railway Company had given a deed to its right of way and abandoned it and taken up and removed its rails, ties and all of its property therefrom. The homesteader and patentee of the land through which the right of way ran sued the railroad company's grantee to quiet title to the right of way strip. The railroad company's title had been derived from the Northern Pacific Congressional grant which was a grant *in praesenti.* The following cases, which are among those the city here relies on, were there cited in support of the contention that the homesteader took no title to the right of way by his patent:

Northern Pacific Ry. Co. v. *Townsend,* 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044;

Holland v. *Northern Pacific Ry. Co.*, 214 Fed. 920, 131 C. C. A. 216;

Northern Pacific Ry. Co. v. *Concannon*, 239 U. S. 382, 36 Sup. Ct. 156, 60 L. Ed. 342.

Commenting on these cases the Idaho court said:

> "*Neither of the cases cited goes to the extent of holding that where, as in this case, the railroad company has abandoned a portion of its right of way, by removal of its tracks and all other railroad property therefrom and by ceasing to use it for the purpose for which it was granted, subsequent to its sale of the tract of land across which that right of way was situated, the reverter would be to the United States instead of to the owner of the servient fee.*
>
> "Upon consideration of the object of the grant, which was to procure to be built, maintained, and operated a transcontinental line of railroad, and not that there be reserved to the United States title to such isolated sections of the original right of way as might be abandoned by changes in the line of road, presumably with the consent of the United States, and which could serve no useful governmental purpose, we are strongly persuaded that it was the intention of Congress that upon the abandonment of such portions as might, from time to time, be found no longer useful for railroad purposes, by reason of changes in the location of the tracks, *title thereto should vest in the owner of the servient fee.*" (Italics supplied.)

The rule stated in this case is precisely the petitioners' contention here, assuming, contrary to the fact, that the Choctaw Company had a grant *in praesenti* of title to a right of way through the public domain, as the Northern Pacific had there. The court considers and rejects the proposition that the reverter in case of abandonment of the right of way "would be to the United States instead of to the

owner of the servient fee." Upon the same reasoning the respondent's contention should be rejected here.

In addition to the foregoing cases we cite the following:

Rio Grande Western Railway Co. v. *Stringham*, 239 U. S. 44;

Oregon Short Line v. *Stalker*, 14 Idaho 362, 94 Pac. 56;

Hurst v. *Idaho-Iowa Lateral Canal Co.*, 34 Ida. 342, 202 Pac. 1068-1070;

Bowman v. *McGoldrick*, 38 Ida. 30, 219 Pac. 1063.

The position of the Land Office is expressed in the following taken from its Regulations Concerning Railroad Right of Way Over the Public Lands, 32 Land Office Dec. 481, 482:

> "The Act of March 3, 1875, is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purpose contemplated by the law, a reversionary interest remaining in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way".

In the case of railroad rights of way in Oklahoma across Indian lands it is held by the Land Office that the railroads have no right to oil or gas from the right of way area. The ownership of these minerals is in the owner of the reversionary estate or title.

Missouri, Kansas & Texas Ry. Co., 33 Land Office Dec. 470;

Missouri, Kansas & Texas Ry. Co., 34 Land Office Dec. 504.

Fourth Proposition.

The provisions of the Choctaw Railway Act were inoperative in the public domain, or if operative therein were not

exclusive and mandatory, but the Railway Company could decline to take its right of way under that Act and could acquire a right of way by purchase or condemnation of lands of settlers and homesteaders, if it chose, and in these cases it did, in compromise settlement of a substantial *bona fide* legal controversy and for a valuable consideration, in fact abandon its claim to a right of way under the Act across the land here involved, and did in fact acquire such right of way by purchase from individual owners to whom the full fee simple title had been conveyed by the United States, and did in fact take title to such right of way by deed containing the express provision that upon abandonment of the land for railroad purposes the full title thereto should revert to the grantors, their heirs and assigns, whereby it estopped itself to deny its grantors' title, or to claim title thereto derived from any other source, and bound itself to recognize and maintain its grantors' title.

Under this proposition petitioners claim that, if it be assumed for the purpose of argument only that the Choctaw Act is a grant of a right of way *in praesenti* and that a patent from the United States conveys no title to the land within the boundaries of the right of way underlying the railroad title to the surface, still the Company's title to the right of way involved in the instant cases was not acquired under the Act of Congress, but by purchase and voluntary conveyance from petitioners' ancestors, and that the assumed grant under the Act of Congress was not compulsory and exclusive, but the company had the right to decline to take title under its provisions to a right of way through Oklahoma Territory after the land therein became subject to private ownership, and might, if it chose, acquire such title by purchase and conveyance from a private owner.

This proposition presents questions both of fact and of law, but on the facts there is no dispute. The company

did in fact, under an agreement to do so and for a valuable and sufficient consideration fully paid, abandon and surrender the proposed location of its road through Oklahoma City under the Act of Congress and did in fact take title to the right of way on which the road was actually constructed by deeds of conveyance from private owners whose title rested on a patent from the United States.

It will be recalled that the line of the road on the original survey and map of location cut diagonally for a very short distance across the northeast corner of the Higgins land. Some two years later this location was moved approximately 600 feet further south in line with the alley between First and Second Streets in the townsite, whence it extended westerly 100 feet wide entirely across the quarter section. Title at this changed location was conveyed by the right of way deed of Higgins and wife for the recited consideration of $400 paid by the company.

Each of these deeds was a bilateral contract by which the company, in consideration of and as a condition of the conveyance, contracted and agreed that, upon the abandonment of the premises conveyed for railroad purposes, they should revert to the grantors, their heirs or assigns. So far as the company and those claiming under it are concerned, this is conclusive evidence that it took title under such deeds and not under the Act of Congress. Upon abandonment of the right of way it is estopped and conclusively bound by this contract, and could not convey any title to anyone else for any other than a railroad purpose, and could not deny the validity of the grantors' title at the time of the execution of the deed. The principle is the same as that by which a tenant is estopped to deny his landlord's title.

Cowell v. *Colorado Springs Co.*, 100 U. S. (10 Otto) 55, 25 L. Ed. 547;

Robertson v. *Pickrell*, 109 U. S. 603, 27 L. Ed. 1049, 3 Sup. Ct. 407;

Stevens v. *Galveston, H. & S. H. Ry. Co.* (Tex. Civ. App.) 169 S. W. 644, 656.

In *Cowell* v. *Colorado Springs Co., supra,* certain premises were conveyed to Cowell by the Colorado Springs Co. with a provision in the deed that upon a certain contingency the title should revert to the grantor. The contingency happened and the grantor brought suit to recover the premises. Cowell defended on the ground that the grantor did not have title to the premises at the time they were conveyed and also denied its corporate existence. The Court in passing on these defenses said:

> "The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is, therefore, estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it." (Citing cases.)

In *Stevens* v. *Galveston, H. & S. H. Ry. Co., supra,* both *Cowell* v. *Colorado Springs Co.* and *Robertson* v. *Pickrell* are quoted at length with approval, and numerous other authorities are cited.

In the instant cases the alleged grant of a right of way was never availed of by the Railway Company insofar as

the land here involved is concerned. Before it had built or even started construction of its road through Oklahoma City it voluntarily and for a consideration and by agreement made to settle a *bona fide* legal controversy abandoned its supposedly granted right of way, and took title to the right of way where it did actually construct its road by purchase and conveyance from individual owners. It seems unreasonable that Congress intended that the Choctaw Railway Act, if ever it could be applied to land of the public domain, should be construed as a mandatory requirement that the company take a right of way under its provisions and in no other way, even though some other way might be more to the advantage of the company.

It should be noted in this connection that the right of way transaction in question took place in 1891 when Oklahoma was a Territory of the United States; that the rights of the parties were fixed by the law as it then existed; and that it is the province and within the jurisdiction of the Supreme Court of the United States, as the highest court of review for Oklahoma Territory, to declare the law as it existed therein in 1891 on this subject, as well as all others, without being bound by decisions of the Supreme Court of the State of Oklahoma, even though the transaction does not present what would be termed a federal question if it had taken place in one of the States of the United States.

Fifth Proposition.

The City of Oklahoma City acquired no title or right to the abandoned right of way of the railroad company under the Act of March 8, 1922, 42 Stat. 414, providing for the disposition of abandoned or forfeited railroad rights of way granted through public lands, and if that Act be construed to grant the right of way here involved to said City then it is violative of the Fifth Amendment to the Constitution of the United States.

The Oklahoma Supreme Court holds that the above Act operates as a conveyance of the abandoned railroad right of way here involved to the City of Oklahoma City. The full text of this Act appears in the record at page 87. Plainly it could have no effect upon this land unless the title thereto upon its abandonment for railroad purposes reverted to the United States instead of to the petitioners. But even so petitioners still contend that it does not operate to grant and convey such land to the City, and particularly is this true with respect to the Higgins land.

The Act does not constitute a grant to the municipality. The gist of it is that whenever public lands of the United States have been granted to a railroad company and have thereafter been abandoned for railroad use, then all right of the United States therein shall be transferred and vested in the person to whom the United States may have patented the legal subdivision traversed by a railroad right of way, except where such right of way is within a municipality, when it shall vest in the municipality, "and this by virtue of the patent thereto and without the necessity of any other or further conveyance." The plain intent of this statute is that in any proper case, where the United States retains ownership of the fee of land over which a railroad right of way has been granted, the title to such right of way in case of abandonment for railroad use is conveyed to the patentee or those claiming under him, whether private person, corporation or municipality.

Under the townsite acts a municipality is always the patentee, either directly or through some official or board as trustee. The term "municipality," as used in the Act means the municipality which received a townsite patent, for the abandoned railroad right of way is to go to the municipality "by virtue of the patent thereto". Neither the city of Oklahoma City, nor its Board of Townsite Trustees, was ever a patentee of the Higgins land, so the only

person to whom the title could pass "by virtue of the patent" was the original patentee or those claiming under him. A careful analysis, which we do not here stop to make, of the grammatical structure of the statute sustains our position. For example, in the phrase "without the necessity of any other or further conveyance or assurance of any kind", the words "other or further" can only refer to the original patent, and that can operate to convey only to the original patentee or his suecessors in title.

In respect of the Noble land, a patent including it was issued to a Board of Townsite Trustees, not in trust for a municipality, but in trust for the occupants of lots within the described area (R. 6). So that whatever title to the abandoned railroad right of way across the Noble lot would pass "by virtue of the patent" would pass in trust for the ancestor of the petitioners Noble.

We cite the case of *James A. Power et al.*, 50 Land Off. Dec. 392, which construes the Act in question.

Attention is also called to the Acts of Congress of 1906 and 1909, which are now found in Section 940, Title 43, U. S. Code, which is as follows:

> "Forfeiture of Rights Where Railroad Not Constructed in Five Years After Location.
>
> "Each and every grant of right-of-way and station grounds made prior to February 25, 1909, to any railroad corporation under the six preceding sections, where such railroad had not been constructed and the period of five years next following the location of said road, or any section thereof, had on that date expired, is declared forfeited to the United States to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and discharged from such easement, and the forfeiture declared shall, without need of further assurance or conveyance, inure to

> the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right-of-way or station grounds."

There would seem to be no reason for distinction in the disposition of a right-of-way between a case where the railroad right was forfeited for failure to construct a road within five years and one where it was forfeited by abandonment for railroad purposes after having been used for a period of years. The two Acts of Congress seem to have the same object and intention and are strikingly similar in language. In both the lands freed from the railroad "easement" are to go by "virtue of the patent" and without further assurance or conveyance to the owner or owners of the land previously conveyed by the United States subject to the granted right-of-way.

If the patents from the United States conveyed to the patentee any title to the land therein described subject to a railroad right-of-way across the same, then any attempt of Congress to convey by legislative enactment that title to another is in contravention of the Fifth Amendment to the Constitution and void.

Conclusion.

Petitioners fully realize that these cases involve no question of Government policy or general public interest. They do involve a substantial property right of the petitioners. They will establish a precedent for the determination of property rights of large value for a considerable number of other persons.

Petitioners believe that the decision of the Oklahoma Supreme Court is flagrantly erroneous in that it takes away their property rights which were fixed and established by Acts of Congress and judicial interpretation of them by this Court more than forty years ago, and in the teeth of

such statute and the decisions of this Court gives those rights to the respondent in these cases. They believe that this High Court is as jealous of protecting the personal rights and property rights of the humblest citizen when these come within its jurisdiction, as it is in determining questions of governmental policy or defining and limiting congressional and executive powers in the enactment and administration of law, or determining any other question of the widest public interest.

So believing, Petitioners confidently ask of this Court that the writs of certiorari prayed for in these cases be granted and that upon the hearing of the cases on the merits the errors committed by the Supreme Court of the State of Oklahoma be corrected.

Respectfully submitted,

JOE T. ROGERS,
WARREN E. LIBBY,
FRED E. SUITS,
R. L. DISNEY,
H. L. GODDARD,
FRED PTAK,
CHAS. H. GARNETT,
Attorneys for Petitioners.

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